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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARY ELLEN PASSARO, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, JEWISH FAMILY & CHILDREN'S SERVICES, Respondent Employer, SCF ARIZONA, Respondent Insurer.	2 CA-IC 2011-0021 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION – INDUSTRIAL COMMISSION

ICA Claim No. 20101520247

Insurer No. 1004088

LuAnn Haley, Administrative Law Judge

AWARD AFFIRMED

Tretschok, McNamara & Miller, P.C.
By Patrick R. McNamara
Tucson
Attorneys for Petitioner Employee

The Industrial Commission of Arizona
By Andrew F. Wade — Phoenix
Attorney for Respondent

SCF Arizona
By James B. Stabler and Veronique Pardee — Tucson
Attorneys for Respondents
Employer and Insurer

V Á S Q U E Z, Presiding Judge.

¶1 In this statutory special action, petitioner Mary Passaro challenges the Industrial Commission of Arizona (ICA) award finding her industrial injury medically stationary without permanent disability. Passaro argues the ICA's decision was not supported by substantial evidence and the administrative law judge (ALJ) erred in refusing to issue a subpoena for an expert medical witness. For the reasons set forth below, we affirm the award.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the award." *Benafield v. Indus. Comm'n*, 193 Ariz. 531, 532, 975 P.2d 121, 122 (App. 1998). Passaro was employed as a psychotherapist with Jewish Family and Children's Services in Tucson from 2007 to 2010. In early 2010, her office was moved to a building in another part of town. According to Passaro, the building was in disrepair and Passaro's new office was very small, "basically a closet" with no outside air and only one vent. Passaro testified the office had a foul smell and a leaky roof and "for years . . . they would just change out the [water-damaged ceiling] tiles."

¶3 Passaro worked in that office from January 2, 2010, until April 9, 2010, when she became ill. Her reported symptoms included migraine headaches, skin rashes, breathing problems, chronic fatigue, and "brain fog." Passaro and her medical experts attributed her illness to the presence of mold-related toxins in the air at her workplace. The ICA accepted Passaro's claim for benefits effective April 12, 2010.

¶4 According to Passaro, her symptoms progressed even after she stopped working and was no longer exposed to the toxic environment. However, Dr. Raymond Schumacher performed an independent medical evaluation (IME) on August 31, 2010, and found "no objective medical evidence that [Passaro's] symptoms ha[d] been caused by her employment at any point in time." He concluded that "even if there ha[d] been some amount of work-related illness, it most likely reached the medically stationary point of maximum medical improvement within a few weeks after cessation of the exposure." Schumacher further concluded, "independent of any assessment of a causal relationship," there was no medical necessity for a restriction of activity or exposure of any kind. Based on the IME, respondent SCF Arizona issued a notice of claim status terminating Passaro's temporary compensation effective September 9, 2010.

¶5 Passaro filed a request for a hearing before the ICA, claiming her case should remain open so that she could obtain further treatment as recommended by her physicians. The ALJ conducted a three-day hearing at which Passaro, her expert witness, Dr. Michael Gray, and respondents' expert, Dr. Steven Pike, testified.[1] After the hearing,

[1]In addition to Passaro's testimony, the IME report prepared by Schumacher, and the medical reports and testimony of Gray and Pike, the ALJ considered reports prepared

the ALJ issued an award terminating Passaro's benefits and finding her "stable and stationary without permanent impairment" as of September 9, 2010. Passaro requested an administrative review of that decision, and the ALJ affirmed her prior decision. This special action followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-951(A), and Rule 10, Ariz. R. P. Spec. Actions.

Standard of Review

¶6 Our review is limited to "determining whether or not the [ICA] acted without or in excess of its power" and whether the findings of fact support the award. A.R.S. § 23-951(B). We defer to the ALJ's factual findings, but review questions of law de novo. *Grammatico v. Indus. Comm'n*, 208 Ariz. 10, ¶ 6, 90 P.3d 211, 213 (App. 2004). The ALJ determines witness credibility, *Royal Globe Ins. Co. v. Indus. Comm'n*, 20 Ariz. App. 432, 434, 513 P.2d 970, 972 (1973), and resolves conflicts in the evidence, *Johnson-Manley Lumber v. Indus. Comm'n*, 159 Ariz. 10, 13, 764 P.2d 745, 748 (App. 1988). "When more than one inference may be drawn, the [ALJ] may choose either, and we will not reject that choice unless it is wholly unreasonable." *Id*. The petitioner has the burden of proving she has a compensable claim. *LaRue v. Indus. Comm'n*, 16 Ariz. App. 482, 483, 494 P.2d 382, 383 (1972).

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by Dr. Daniel Mihalyi and Dr. B. Robert Crago, both of whom had treated and/or tested Passaro, and various pieces of academic literature submitted into evidence.

Discussion

Substantial Evidence

¶7 Passaro argues the ALJ's finding that she is "stable and stationary without permanent impairment" from her industrial injury is not supported by substantial evidence. She points to the medical experts' conflicting testimony and maintains the ALJ erred by accepting the testimony of respondents' medical expert as "most probably correct and well-founded" because his opinions were foundationally flawed. We will affirm an ICA award if it is reasonably supported by the evidence. *Carousel Snack Bar v. Indus. Comm'n*, 156 Ariz. 43, 46, 749 P.2d 1364, 1367 (1988).

¶8 Dr. Gray, who practices in the areas of internal medicine and toxicology, began treating Passaro in October 2010 after her temporary compensation had terminated. Gray testified that as a result of Passaro's workplace exposure to mold and its toxic derivatives, she developed several continuing illnesses: gastrointestinal mucocutaneous mycosis, mixed mold mycotoxicosis, toxic encephalopathy, and small airways obstruction. To support his opinion, Gray pointed to diagnostic tests he had conducted that showed "specific objective findings of ongoing mold exposure problems."[2] Gray testified he had been treating Passaro with "sequestering agents" to remove the toxins

[2]Gray claimed Passaro had a "Class Two low resolution phenotype on five specific markers," making her more susceptible to health problems from mold exposure. He testified Passaro had elevated levels of the C4a complement split product and two mycotoxins—ochratoxin and trichothecenes—in her system and she had an unusual organism—Rhodotorula—in her stool. He also referred to a breathing study in which Passaro's "flow rates" improved after treatment.

from Passaro's system and to reduce her "oxidative stress." He said she needed to continue these treatments for two and one-half to three years.

¶9 At respondents' request, Dr. Pike examined Passaro in February 2011. Pike is board certified in medical toxicology and occupational and environmental medicine and works primarily as an emergency room physician. After examining Passaro and reviewing her medical records, Pike prepared a report stating that Passaro's "claimed symptoms are not the result of her alleged April 7, 2010 work related injury." Pike testified, "there is no objective evidence in medicine that an individual who has had an exposure to mold in an indoor setting has a basis for a continuing problem," and "any illnesses [Passaro] had related to [her] exposure would have been abated and resolved within days or weeks . . . from the cessation of exposure." He opined that Passaro's symptoms were psychological in nature and that she was suffering from Munchausen syndrome.[3] Pike also disputed Gray's "objective findings," questioning the validity of the testing methodology and pointing to factors that might have influenced the results.

¶10 It is the ALJ's duty to resolve conflicts in the medical testimony. *See Johnson-Manley Lumber*, 159 Ariz. at 13, 764 P.2d at 748. To the extent Passaro suggests the ALJ failed properly to do so, we disagree. "The ALJ is not required to make findings on all the issues raised in a case, as long as he resolves the ultimate issues." *Sun Valley Masonry, Inc. v. Indus. Comm'n*, 216 Ariz. 462, ¶ 27, 167 P.3d 719, 725 (App. 2007). We will vacate the ALJ's award only if we cannot determine the factual basis of

[3]According to Pike, Munchausen syndrome is a "factitious disorder," wherein those affected seek medical care and treatment for some alternate benefit or gain.

his or her conclusion or whether it was legally correct. *Post v. Indus. Comm'n*, 160 Ariz. 4, 7, 770 P.2d 308, 311 (1989).

¶11 The ultimate issue in this case was whether Passaro's industrial injury was stationary without permanent impairment. In her decision, the ALJ described the evidence presented in detail, including the medical experts' conflicting testimony. The ALJ accepted Pike's opinion "as most probably correct and well founded," because of his "qualifications . . . and his thorough review of the literature and examination of . . . Passaro." She also found Schumacher's opinion corroborated Pike's opinion. The ALJ rejected Passaro's testimony as not credible and found Gray's opinion to be "less persuasive" because it was based on his "acceptance of [Passaro's] subjective complaints" and because of the "lack of objective findings." We conclude these findings adequately addressed and resolved the conflict in the medical evidence.

¶12 Passaro nevertheless argues Pike's testimony lacked foundation and was thus legally insufficient to support the award. Relying on *Desert Insulations, Inc. v. Industrial Commission*, 134 Ariz. 148, 654 P.2d 296 (App. 1982), Passaro maintains Pike's testimony is foundationally flawed because his opinions were based on the flawed premise that she never had a valid work-related injury. She suggests that Pike's diagnosis of Munchausen syndrome, one he was not qualified to make, is evidence of his bias against her and is the basis for his belief that she never suffered an injury.

¶13 In *Desert Insulations*, a medical expert testified that his opinion would be wrong if the facts of the case were different than what he believed them to be. 134 Ariz. at 151, 654 P.2d at 299. We acknowledged that in some cases medical testimony can be

"so weakened by proof of an inaccurate factual background" that it could not "be said to constitute 'substantial evidence.'" *Id.*, *quoting Russell v. Indus. Comm'n*, 98 Ariz. 138, 145, 402 P.2d 561, 565 (1965). In that case, because the facts of the case were different than the expert understood them to be, we concluded it was error for the ALJ to rely on the expert's testimony without addressing the discrepancy in his findings. *Id.* However, we noted that not every factual inaccuracy warrants disregard of the affected expert's opinion. *Id.*

¶14 We find *Desert Insulations* distinguishable. Although Pike stated in his report that Passaro "never had a legitimate work related injury caused by exposure to mold, mold hyphae, [or] mold mycotoxins," he subsequently clarified, "[m]y report and opinions are based on my acknowledgement of th[e] fact" that Passaro's initial claim of injury was accepted. And Pike unequivocally testified he could "accept as a legal fact that . . . Passaro had an injurious exposure to mold." Here, as *Desert Insulation* requires, the ALJ considered Pike's initial assessment in light of his overall opinions and addressed it in her findings, concluding "Pike's opinion is not based on a 'flawed' foundation as he accepted [Passaro] suffered symptoms from her exposure to mold." That determination was within the ALJ's discretion. *See Royal Globe Ins. Co.*, 20 Ariz. App. at 435, 513 P.2d at 973 ("If a witness makes contradictory statements in regard to the material issues of a case, the trier of fact may accept as true either statement, or, on account of the discrepancy, may disregard the testimony of the witness entirely.").

¶15 Admittedly, this is a close case.[4] However, our review on appeal is limited. *See* § 23-951(B). The ALJ's findings will be disturbed only if the conclusion cannot be supported by any reasonable theory of the evidence, even if this court would have reached a different conclusion. *Phelps v. Indus. Comm'n*, 155 Ariz. 501, 506, 747 P.2d 1200, 1205 (1987). Here, the ALJ's determination that Passaro is "stable and stationary without permanent impairment" is supported by reasonable evidence. Although Gray opined that Passaro's current symptoms were caused by mold exposure, Pike disputed this assertion. As noted above, Pike discounted each of the diagnostic tests on which Gray relied to support his "objective findings," and Passaro failed to persuasively rebut Pike's opinions on cross-examination. *See LaRue*, 16 Ariz. App. at 483, 494 P.2d at 383 (petitioner has burden of proof). Despite Pike's improper Munchausen diagnosis and its potential effect on the ALJ's credibility determinations, Gray's "lack of objective findings" was a sufficient basis for the ALJ's conclusion. Moreover, Gray acknowledged this is a "developing" area of medicine. Based on the conflicting medical testimony, it

[4]Although we conclude Pike's testimony constituted substantial evidence to support the ALJ's award, Passaro's arguments are not without merit. For example, Pike's examination of Passaro was limited to thirty or forty minutes of "face-to-face" time. And, although he is board certified in medical toxicology and claimed that he had conducted "extensive research" on this subject, Pike could not recount any of the relevant articles he had read. Moreover, Pike diagnosed Passaro with Munchausen syndrome, based on his experience as an emergency room physician, but he did not know if it was included in the DSM-IV Diagnostic Statistical Manual. In our view, however, these issues go to the weight of his testimony, and we will not reweigh the evidence on appeal. *See Carousel Snack Bar*, 156 Ariz. at 46, 749 P.2d at 1367. And, unlike the expert testimony this court recently considered in *Hackworth v. Industrial Commission*, ___ Ariz. ___, 275 P.3d 638 (App. 2012), Pike was unequivocal in his opinion that Passaro's current symptoms were not, and could not be, caused by the mold exposure at her workplace. Based on the record before us, we cannot say his opinions were mere speculation.

was not unreasonable for the ALJ to adopt Pike's opinion as "most probably correct and well-founded." *See Johnson-Manley Lumber*, 159 Ariz. at 13, 764 P.2d at 748.

Subpoena of Expert Witness

¶16 Passaro next argues the ALJ erred in refusing to issue a subpoena for her psychologist, Dr. Crago. The ALJ's ruling will not be overturned absent an abuse of discretion. *Nolden v. Indus. Comm'n*, 127 Ariz. 501, 503-04, 622 P.2d 60, 62-63 (App. 1980).

¶17 Generally, any interested party has a right to request a hearing concerning unresolved issues in a workers' compensation case and to subpoena witnesses to testify at that hearing. A.R.S. § 23-941(A), (B), (G); *see also* A.R.S. § 23-947 (setting forth time limits for requesting a hearing). To effectuate those rights, the ICA is empowered to "[i]ssue and serve . . . subpoenas for the attendance of witnesses." A.R.S. § 23-921(A)(3). Pursuant to a party's timely request, the ALJ "shall issue a subpoena . . . if the judge determines that the testimony of the witness is material and necessary" and the party complies with the judge's order to furnish a "[s]tatement of expected testimony."[5] Ariz. Admin. Code R20-5-141(A)(2), (3), (4).

¶18 Passaro argues she followed the proper procedure to obtain a subpoena for Crago by making a timely pre-hearing request and by furnishing the ALJ with a statement of expected testimony. *See* Ariz. Admin. Code R20-5-141(A)(2), (3). And because

[5]The administrative code provides that a statement of expected testimony is required to secure a subpoena when ordered by the ALJ. *See* Ariz. Admin. Code R20-5-141(A)(3). Passaro filed such a statement even though we find nothing in the record to suggest the ALJ had ordered her to do so.

Crago was the only psychological expert to test and examine her, and part of her claim was a work-related psychological and cognitive injury, Passaro maintains his testimony was clearly material and necessary. Respondents counter that Passaro has waived this issue by not raising it in her post-hearing memorandum or in her request for review. They further contend that even if the issue had been preserved for appellate review, the ALJ's decision was reasonable because "[Crago's] testimony would have been cumulative or immaterial."

¶19 The ICA is vested with "'sound discretion to regulate and control the witnesses appearing before it, and its award will not be disturbed by an appellate court for mere procedural errors.'" *Benafield*, 193 Ariz. 531, ¶ 26, 975 P.2d at 129, *quoting Travelers Ins. Co. v. Indus. Comm'n*, 18 Ariz. App. 28, 30, 499 P.2d 759, 761 (1972). However, "the right to present witnesses on one's own behalf, although certainly not absolute, is a fundamental tene[]t of due process to which an ALJ generally must adhere in order to 'achieve substantial justice.'" *Id.*, *quoting* A.R.S. § 23-941(F). Accordingly, an ALJ may refuse to issue a subpoena only where a requested summary statement has not been provided or "where it is clearly shown in the statement itself that the solicited testimony would not be material or necessary." *Reinprecht v. Indus. Comm'n*, 27 Ariz. App. 7, 10, 550 P.2d 654, 657 (1976).

¶20 First, we agree with Passaro that the issue has not been waived. Passaro requested the ALJ to issue a subpoena for Crago by letter dated January 28, 2011, well before the first scheduled hearing. Then, at the March 29 hearing, Passaro asked the ALJ whether she would issue a subpoena, and the ALJ responded by stating the testimony

would be cumulative, though leaving the issue open. Thereafter, by letter dated April 5, Passaro outlined Crago's proposed testimony, and she again raised the issue at the end of the June 3 hearing.[6] Moreover, contrary to respondents' argument, the issue relating to Passaro's subpoena request was expressly included in her request for review to the ALJ. In short, the ALJ had numerous opportunities to rule on the request, and her reasons for not issuing the subpoena are clear, based on the record before us. *Cf. Obersteiner v. Indus. Comm'n*, 161 Ariz. 547, 549, 779 P.2d 1286, 1288 (App. 1989) (issue preserved even though not raised in request for review because apparent from record issue raised below). We therefore consider the merits of Passaro's argument.

¶21 Prior to any hearings in this matter, Passaro submitted Crago's January 2011 medical report into evidence. *See* Ariz. Admin. Code R20-5-155 (filing medical report into evidence). In that report, Crago stated he had performed a neurobehavioral evaluation of Passaro and that the results showed depressed brain functioning consistent with toxic exposure to mold.[7] Crago's diagnoses included "chemical hyper reactivity"

[6]The ALJ responded to this request by again noting, "Gray did address his concurrence with . . . Crago's opinion, and his report is in the file." She then asked whether respondents needed to cross-examine Crago, and respondents' counsel responded, "I do not." The respondents therefore waived their right to cross-examine Crago. *See Scheytt v. Indus. Comm'n*, 134 Ariz. 25, 28-29, 653 P.2d 375, 378-79 (App. 1982) (ALJ's discretion to refuse subpoena limited by party's right to cross-examine witness providing material evidence).

[7]Specifically, Crago performed an Integrated Visual and Auditory Continuous Performance Test (IVA-CPT) and a Quantitative EEG with Neurometric Analysis. On the IVA-CPT, designed to test "focus, speed of response, stamina, and consistency," Passaro "performed so poorly . . . [the test] could not be scored." As to the EEG testing, Crago described statistically and clinically significant results including depressed functioning in the prefrontal cortical area consistent with toxic exposure.

and "adjustment disorder with mixed features of depression and anxiety." He recommended further neuropsychological testing and treatment under Dr. Gray's direction.

¶22 In Passaro's statement of expected testimony furnished to the ALJ, she stated that should Crago be allowed to testify, "[he] w[ould] testify in accordance with his 12 page report."[8] Similarly, at the June 3 hearing, Passaro stated that Crago would testify "[she] has some adjustment disorder, with features of depression and anxiety"—opinions Crago had included in his medical report.[9] Proposed testimony is not "material or necessary" if it is merely redundant to a medical report already in the file. *Reinprecht*, 27 Ariz. App. at 10, 550 P.2d at 657. Based on Passaro's own statements, we cannot say the ALJ abused her discretion in determining Crago's proposed testimony, consistent with his twelve-page report, was cumulative and therefore unnecessary. The ALJ clearly considered Crago's report in reaching her conclusion and resolved any conflict in the medical evidence in favor of the respondents.

¶23 Passaro also argues that even if a subpoena was not required for Crago's direct testimony, the ALJ should have issued a subpoena to permit her to call him "as a rebuttal witness" to counter Pike's Munchausen-syndrome diagnosis, arguing that unlike Crago, Pike is not a mental-health expert. Immediately after Pike testified, Passaro

[8]The statement also indicated that Crago would testify about the results of testing he performed, as "spelled out in his report."

[9]The only response in the record to the various requests for the issuance of a subpoena was the ALJ's earlier determination that Crago's testimony would be cumulative.

renewed her subpoena request and informed the ALJ that Crago would not have made that diagnosis and would testify accordingly. As we have stated in other cases, the ALJ's discretion to regulate and control the witnesses that appear before it should not be used arbitrarily to deny a litigant the opportunity to present evidence. *See Polston v. Indus. Comm'n*, 13 Ariz. App. 291, 293, 475 P.2d 950, 952 (App. 1970).

¶24 Here, however, we cannot say the ALJ's decision was arbitrary. Although the ALJ determined Passaro's account of her symptoms was not credible, nothing in the ALJ's decision suggests that determination was based on Pike's improper Munchausen-syndrome diagnosis. When considering Pike's testimony in its entirety, that diagnosis was a minor component of his broader opinion that there was no objectively verifiable evidence Passaro suffered from an ongoing mold-related injury. And, even though we believe the Munchausen diagnosis unfortunately and unnecessarily complicated the case, we cannot say it absolutely required Crago being called as a rebuttal witness. The ALJ's decision refusing the subpoena for Crago was not an abuse of discretion.

Disposition

¶25 The ICA's award is affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge